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REPORT OF THE EXPERT MEETING ON EXISTING REGIONAL AND MULTILATERAL INVESTMENT AGREEMENTS AND THEIR DEVELOPMENT DIMENSIONS

Held at the Palais des Nations, Geneva,
from 1 to 3 April 1998

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I. AGREED CONCLUSIONS [a]

1. The Expert Meeting reviewed regional and multilateral investment agreements in pursuance of the mandate given in paragraph 89 (b) of "A Partnership for Growth and Development" to identify and analyse implications for development of issues relevant to a possible multilateral framework on investment. The meeting focused on the objectives of regional and multilateral instruments and the question of definition of investment in existing investment agreements, paying particular attention to their development dimension. It had a broad discussion of these subjects.

2. As regards the question of definition, the Expert Meeting discussed, in particular, the advantages and disadvantages for development of broad and narrow definitions of "investment". It concluded that these provisions raise questions that are both difficult and complex, and, at the same time, very important because they interact with and define the scope of all other provisions. The Expert Meeting recognized the importance of developing a knowledge base concerning countries' experience with different types of definitions and recommended that the secretariat should prepare an analysis of such provisions in international investment agreements.

3. The Expert Meeting observed that development is an important objective of international investment agreements. How this can be achieved remains a critical issue that needs to be examined further. The experts felt that further work could be undertaken to elucidate development dimensions that need to be taken into consideration when formulating international investment agreements.

4. The Expert Meeting also felt that, in order to help clarify the complex issues related to international investment agreements, all appropriate stakeholders may be heard, so as to shed further light on the interrelationships between international investment agreements and economic growth and development.

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[a] As adopted by the Expert Meeting at its closing plenary meeting on 3 April 1998.

II. CHAIRPERSON'S SUMMARY

1. The discussions of the Expert Meeting on agenda item 3 were structured according to the following two themes:

(a) Objectives of regional and multilateral investment agreements, with particular attention to the development dimension; and

(b) Definition of investment in regional and multilateral investment agreements.

A. Objectives of regional and multilateral investment agreements, with particular attention to the development dimension

2. In his opening address, the Secretary-General of UNCTAD noted that the number of regional and multilateral investment agreements had increased significantly in recent years, and stressed the importance of keeping the development dimension in mind when dealing with such agreements. It followed that, in order to ensure tangible benefits, international investment agreements must meet what could be called criteria for "development-friendliness". Those criteria should determine, firstly, how investment frameworks could promote the equitable integration of developing countries into the international economic system by facilitating increased foreign direct investment (FDI) flows to a wide range of developing countries, and, secondly, how investment frameworks could help countries to maximize the positive effects of FDI and minimize any negative effects. Learning from the actual experiences of countries that had signed international investment agreements recently would be especially beneficial. Important indicators would include not only the quantity of investment received under such agreements but also the quality of that investment. The Secretary-General stressed the need to avoid creating a gap between international organizations and Governments working on the elaboration of international investment agreements, on the one hand, and groups from civil society that were affected by those agreements (including local businesses and social and environmental groups), on the other.

3. The session began with a panel discussion on the topic entitled "How can regional and multilateral investment agreements be structured to serve development objectives?". Mr. A.V. Ganesan, introducing the discussion, noted that developing countries wished to encourage the flow of FDI and maximize the benefits to be derived from it, while at the same time fostering and, if necessary, protecting domestic enterprises with a view to strengthening domestic economic and technological capabilities. He pointed out that most international investment agreements did not prevent host countries from establishing their own policies on the admission of foreign investors; it was on that basis that they guaranteed the treatment and protection of investments after admission. Mr. F. Hamburger, in describing the development objectives in the investment-related provisions of the Lomé Convention, stressed the need for technology transfer on a sustainable basis. He noted that domestic capital formation was an important prerequisite for investor confidence and that training and capacity-building had to be provided in order to bring about an investment-friendly environment. Development-friendly investment should be based on transparent rules balancing the benefits and obligations of the contracting parties. The concerns of

developing partners could be taken into account by means of safeguard clauses, transition periods and specific provisions ensuring the gradual integration of developing countries in the world economy. Mr. C. Phasukavanich compared the principles under negotiation for the Investment Area of the Association of South-East Asian Nations (ASEAN) to the Non-binding Investment Principles adopted by the Asia-Pacific Economic Cooperation forum (APEC) in 1994, emphasizing their development objectives. He noted that a transition period was necessary for developing countries entering into a liberalized trade and investment regime and pointed to the economic and technical cooperation activities in the framework of APEC as reflecting the need for adjustment before liberalization. Mr. J. Poblano discussed the development dimension of the General Agreement on Trade and Services (GATS) and the North American Free Trade Area (NAFTA), emphasizing the role of developing countries in the GATS negotiations and the resulting emphasis on progressive liberalization, strengthening domestic service capacities and increasing exports from developing countries.

4. In the discussion that followed, several themes emerged and specific points were made. There was extensive agreement on a number of issues, although different opinions were expressed on others. It was generally agreed that international agreements per se, however friendly to investors, could not guarantee an increase in FDI flows. Economic and other preconditions for investment were more important in influencing the direction of FDI. Much of the discussion on objectives focused on liberalization, and on its extent and timing. Many experts considered liberalization inevitable, but concern was expressed over its impact on the economies of developing countries and on domestic firms there. It was thus accepted that liberalization had to be progressively implemented, on the international as well as on the national levels, although there were various opinions as to the exact sequence or phases of implementation and the precise measures and devices to be used. Recent practice concerning transitional arrangements and exceptions in specific international agreements showed that it was possible, through the use of such methods, to cope with the diversity of situations and development levels in international arrangements. Several experts stressed the need to respect the policy choices of capital- and technology-receiving countries (the host countries) and the need for increased flexibility in any international investment agreement, which should take into account the special needs of developing countries, particularly those of the least developed ones. The need for proper national policies in host countries and for compensatory mechanisms to balance the possible negative social or other effects of liberalization was also stressed.

5. The issue of national treatment for FDI was a matter of considerable debate. Some delegates held that national treatment should certainly cover the admission of investments as well as their treatment after entry, even if subject to exceptions or "negative lists". Other experts questioned whether it was appropriate for host Governments to accord national treatment to foreign firms, even after admission, since a Government would then be deprived of its capacity to help domestic enterprises successfully face their foreign competitors. They stressed that the host Government should be able to apply its policies to specific cases and only offer protection guarantees to investments which had already been admitted. There were also some differences of opinion over the use of performance requirements. Some experts felt that they constituted valuable tools of economic policy for host countries, while others rejected them as undue interferences in the market, and recalled that some performance requirements were covered under the agreement on trade-related investment measures (TRIMs). The

need for a stable and transparent institutional and legal framework in host countries was emphasized by many experts, although some questioned whether it could be brought into existence before the effects of unfettered liberalization were felt. Finally, the need for rules concerning competition, restrictive business practices and incentives, and the protection of the environment was accepted by most experts as complementing liberalization and in no way running counter to it. It was stressed by several experts that the extent to which an international investment agreement was development-friendly would depend on many factors, particularly the extent to which development objectives were apparent, not only in its preamble, but also in its structure and scope and in its particular provisions, and in the ways in which it took account of the diversity of the situations and conditions in various countries.

6. In summary, it should be noted that existing regional and multilateral investment agreements had been useful in balancing the interests of the countries concerned. While liberalization appeared inevitable, the spirit and pace at which it took place could vary, and host countries remained responsible for their own development.

B. Definition of investment in regional and multilateral investment agreements

7. Several experts recognized the difficulty and complexity of the provisions concerning definitions in international investment agreements. Such provisions interacted with and defined the scope of all other provisions. Much of the discussion concerned the advantages and disadvantages from a development perspective of broad and narrow definitions of "investment". It was noted that the most commonly used definition embraced "every kind of asset", although some experts questioned the desirability from a development perspective of including certain types of assets, such as portfolio investment, non-equity forms of investment, non-commercial assets and intangibles, particularly in agreements that liberalized entry of investment. At the same time, other experts considered that each type of investment could potentially make a contribution to development and that a narrow definition, particularly in a multilateral agreement, might not provide sufficient flexibility over time. Some of the practical difficulties of distinguishing between different types of investment were also noted.

8. There was also discussion on the interaction between the definitions and the other provisions of investment agreements. It was noted, for example, that concerns raised by broad definitions of investment could be addressed through qualifications in the operative provisions. A number of experts commented, however, that in a multilateral agreement the necessary qualifications could create undue complexity, particularly when taking into account the different levels of development of countries and each country's development policies. Accordingly, it was suggested that there was a need for the creation of a knowledge base concerning each country's experience with definitions of investment.

9. In summary, the complexity of the issue of definitions should be noted, as should the importance of further detailed study of the issue by the secretariat.

C. Chairperson's synthesis

10. There appeared to be broad agreement that the ultimate objective of existing regional and multilateral investment agreements was to promote increased investment flows, initially between signatories of the agreements, which would help countries to strengthen their corporate sectors so that they could open up eventually to others outside the signatory countries. The critical elements in existing agreements included non-discrimination, the opening up of industries, equitable treatment under the rule of law and recognition of the nature and differing stages of development of various signatories.

11. All participants saw the validity of FDI as an aid to economic growth and development. It was acknowledged that investment agreements in and by themselves did not increase the flow of cross-border investment. The investment environment was vital to attract investments. Its principal elements included political and economic stability, the rule of law, a strong institutional and regulatory framework providing intellectual property protection and protection against unfair expropriation, and dispute-resolution mechanisms. With or without investment agreements, those were all critical issues for investors.

12. Regional and multilateral investment agreements were recognized as an added factor, a new dimension in the investment equation. However, such agreements should promote development-friendly liberalization. It was generally accepted that what was desired was sustainable growth and development, with all players - foreign investors, domestic investors, host Governments and the Governments of the capital- and technology-exporting countries (the home countries) - taking responsibility for ensuring sustainable development that would bring short-, medium- and long-term benefits to all.

13. There was, however, an appeal from both developed and developing countries that liberalization should not undermine domestic investor rights, or deprive them of opportunities within their own economies. Domestic investors might not be in a position to compete with foreign investors, even if the foreign investors were medium-size companies from large developed economies. In that respect, it was noted that the control of anti-competitive practices and issues relating to the transfer of technology and the obligations of investors often became critical issues. International agreements needed to take those sensitivities into account.

14. With regard to the question of the "level playing field", it was a valid approach as long as it meant that the rules were the same for everybody, and that all players had similar status and were thus in a position to take advantage of what the playing field had to offer. In that context, it was recognized that the pace of liberalization and the progressive phasing of liberalization had been critical to the successful conclusion of regional and multilateral investment agreements to date. It was noted that regional and multilateral investment agreements had successfully taken into account the special needs and interests of signatory countries in different stages of economic development. Special and differential treatment had been agreed upon which reinforced and respected the regulatory responsibilities of individual Governments. Such treatment was critical in that it gave countries time to evolve adequate laws, rules and regulations to ensure that all players benefited from the initiatives. It was agreed that all international investment agreements should strive to create a win-win situation, and that international investments flows should not be a zero-

sum game. Not a "beggar-my-neighbour" but a "prosper-my-neighbour" policy should be the prime objective driving regional and multilateral investment agreements, and it should be coupled with the recognition that the growth and development objectives of all parties provided the foundation for such investment initiatives.

15. In sum, it was suggested that the ultimate objective of international investment agreements was growth and development. To that end, stable, transparent and predictable investment frameworks that also provided security for investments helped to attract investment flows that could contribute to employment, technology transfer, efficiency and competitiveness, and help in promoting the integration of developing countries into the world economy, with a view towards sharing in the benefits of globalization and strengthening domestic capacities. Those objectives could further be served by progressive, development-friendly liberalization, with appropriate timing and pace and proper flexibility, such as allowing for special and differential treatment for developing countries, safeguards, exceptions, derogations, escape clauses and phasing, and taking into account the diversity of national capacities and conditions. Liberalization needed to be combined with sound and coherent domestic economic policies, the creation of effective judicial systems, the promotion of the rule of law and respect for the regulatory responsibility of Governments. In furthering the development objective, attention also needed to be given to measures ensuring the proper functioning of the market, especially through the control of anti-competitive practices (including transfer pricing) by firms, the promotion of the transfer of technology, the question of investor obligations, and the use of investment incentives. In addition, investment arrangements needed to be seen in the wider context of other international agreements, broader macroeconomic policies and the basic determinants of investment flows.

16. To help create a better understanding of the issues involved, it was suggested that the UNCTAD secretariat should:

(a) Prepare a set of criteria for development-friendliness and identify ways and means of applying them to the formulation of international investment agreements; and

(b) Study and make transparent - through dialogues and other appropriate mechanisms - the initiatives, development efforts, aspirations and strategies (or "IDEAS") of the key players in international investment, namely, foreign investors, home countries, host countries and domestic investors.

17. The question of definitions was recognized as being highly technical in nature. Many regional and multilateral investment agreements used definitions that had been designed to meet the specific aspirations and needs of the signatory parties. The broadness of definitions in respect of investment protection agreements and the narrowness of the definition in respect of liberalization emphasized the complexity of the issue. It was suggested that the UNCTAD secretariat should develop a compendium and analysis of definitions within existing agreements, so that they could become reference points for future drafters of regional and multilateral investment agreements.

18. Most, if not all, participants shared the view that the meeting was a great success. The discussions on substantive items of significance to the international community were well focused, in depth and animated. However, if there had been more give and take from all sides, and if every participating expert had been prepared to see more clearly and appreciate the need to recognize the IDEAS of the diverse parties to the dialogue, more progress could have been made on substantive issues and on making recommendations that would benefit all parties.

19. There is a need to bridge the gap between the legitimate concerns of home countries that there should be fair treatment and security for their investors and the equally legitimate fears of host countries that the process of liberalization could compromise domestic IDEAS and the legitimate concerns of domestic investors. International investment agreements, to be of interest to all and to be durable, need to take into account both the concerns of investors and the legitimate fears of host countries.

20. There should also be heightened awareness that the dichotomy between the home countries and the host countries is becoming increasingly blurred, as many countries (even developing countries) play the dual role of home and host country, and while FDI is welcomed, their own investors also participate in FDI in other countries.

21. Finally, the secretariat should be thanked for the standard of excellence that it has set in the organization of the meeting in both substantive and logistic terms. The professionalism exhibited by all secretariat staff resulted in the documentation made available to experts and the agreed conclusions of the Expert Meeting.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

1. In accordance with the recommendation made by the Commission on Investment, Technology and Related Financial Issues at the closing meeting of its second session on 3 October 1997,[4] the Expert Meeting on Existing Regional and Multilateral Investment Agreements and Their Development Dimensions was held at the Palais des Nations, Geneva, from 1 to 3 April 1998. The meeting was opened on 1 April 1998 by Mr. Rubens Ricupero, Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

2. At its opening meeting, the Expert Meeting elected the following officers to serve on its Bureau:

Chairman:	Mr. Dato Jegathesan (Malaysia)
Vice-Chairman-cum-Rapporteur:	Mr. Zoran Jolevski (The Former Yugoslav Republic of Macedonia)

C. Adoption of the agenda

(Agenda item 2)

3. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in TD/B/COM.2/EM.3/1. Accordingly, the agenda for the Meeting was as follows:

1. Election of officers
2. Adoption of the agenda
3. Examination and review of existing regional and multilateral investment agreements and their development dimensions in pursuance of the mandate of paragraph 89 (b) of "A Partnership for Growth and Development"
4. Adoption of the report

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[4] See Report of the Commission on Investment, Technology and Related Financial Issues on its second session (TD/B/44/14-TD/B/COM.2/7), paragraph 51.

D. Documentation

4. For its consideration of the substantive agenda item (item 3), the Expert Meeting had before it a report by the UNCTAD secretariat entitled "Existing regional and multilateral agreements on investment and their relevance to a possible multilateral framework on investment" (TD/B/COM.2/EM.3/2).

E. Adoption of the report

(Agenda item 4)

5. At its closing meeting, on 3 April 1998, the Expert Meeting adopted the agreed conclusions reproduced in section I above, and authorized the Chairperson to prepare a summary of the Meeting (see section II above).

Annex

ATTENDANCE */

1. Experts from the following States members of UNCTAD attended the meeting:

Algeria
Argentina
Austria
Bangladesh
Belarus
Benin
Botswana
Brazil
Bulgaria
Cameroon
Canada
Chile
China
Colombia
Comoros
Costa Rica
Côte d'Ivoire
Cuba
Czech Republic
Dominican Republic
Egypt
Ethiopia
France
Gabon
Guinea-Bissau
Indonesia
Iran (Islamic Republic of)
Iraq
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Libyan Arab Jamahiriya
Lithuania
Madagascar
Malawi
Malaysia
Malta
Mauritius
Mexico
Morocco
Myanmar
Nepal
Netherlands
Nigeria
Norway
Pakistan
Peru
Philippines
Poland
Romania
Russian Federation
Saudi Arabia
Senegal
Singapore
Slovakia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Thailand
The Former Yugoslav Republic of Macedonia
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Kingdom of Great Britain and Northern Ireland
United States of America
Venezuela
Viet Nam
Yemen
Zambia
Zimbabwe

2. The Economic Commission for Europe, the United Nations Environment Programme and the United Nations Development Programme were represented at the session. The International Trade Centre UNCTAD/WTO was also represented at this session.

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*/ For the list of participants, see TD/B/COM.2/EM.3/INF.1.

3. The following specialized agencies and related organizations were represented at the session:

International Monetary Fund
World Intellectual Property Organization
United Nations Industrial Development Organization

The World Trade Organization was also represented at the session:

4. The following intergovernmental organizations were represented at the session:

African, Caribbean and Pacific Group of States
Agency for Cultural and Technical Co-operation
Arab Labour Organization
European Community
European Free Trade Association
Latin American Economic System
League of Arab States
Organisation for Economic Co-operation and Development
Organization of African Unity
Organization of the Islamic Conference

5. The following non-governmental organizations were represented at the session:

General Category:

Commission of the Churches on International Affairs
Friends World Committee for Consultations (Quakers)
International Confederation of Free Trade Unions
Third World Network
Women's International League for Peace and Freedom
World Federation of United Nations Associations

Panellists, resource persons specially invited participants

Panellists

Mr. A.V. Ganesan, Former Commerce Secretary to the Government of India
Mr. Friedrich Hamburger, Director, Directorate General VIII-A, Development Policy, European Commission
Mr. Chakramon Phasukavanich, Deputy Secretary General, Office of the Board of Investment, Thailand
Mr. Jose Poblano, Trade Representative of Mexico in Canada

Resource persons

Mr. A.A. Fatouros, Professor of International Economic Law, University of Athens, Greece
Mr. Kamel Hossain, Senior Advocate of the Supreme Court, Bangladesh
Mr. Kenneth J. Vandevelde, Professor of Law, Thomas Jefferson School of Law, San Diego, California, United States of America

Specially invited participants

Mr. Anders Ahnlid, Deputy Permanent Representative of Sweden to the OECD Paris, France
Mr. Michael Green, Economist, Department of International Development, United Kingdom
Mr. Wolfgang Kreissl-Doerfler, Rapporteur on the MAI, European Parliament
Mr. Fulgence Bassono, Director, Multi Conseils Associés, Ouagadougou, Burkina Faso
Mr. Al Fadil Nayil Hassan, Director, Legal Department, Inter-Arab Investment Guarantee Corporation, Safat, Kuwait
Mr. Michael Hindley, European Parliament
Ms. Alice Landau, Department of Political Science, University of Geneva, Switzerland
Ms. Vera Nicolas-Gervais, Executive Director, Emporio Trade and Investment Consultancy, Swampscott, Ma., United States of America
Mr. Francois de Tinguy, Union international du Notoriat Latin, Lausanne, Switzerland
Mr. Francois Ullmann, Hexa Consultants, Geneva, Switzerland
Mr. Mark Vallianatos, Friends of the Earth, Washington, DC, United States of America
Mr. Kee Hwee Wee, Assistant Director, Investment and Finance, ASEAN Secretariat, Jakarta, Indonesia
Ms. Lise Weis, Senior Expert, Energy Charter Secretariat, Brussels, Belgium